Before the FEDERAL COMMUNICATIONS COMMISSION OF SHAND WASHINGTON, D.C. 20554

In the Matter of)		
Amendment of Parts 21 and 74 of the)	RM-9060	RECEIVED
Commission's Rules to Enhance the Ability)		- EOLIVED
of Multipoint Distribution Service and)		400 7 0 4000
Instructional Fixed Television Service)		APR 3 0 1997
Licensees to Engage in Fixed)	Fe	deral Communications Commission
Two-Way Transmissions)		Office of Secretary

TO: The Commission

COMMENTS OF ISTA

Interactive Video Data Trade Association, Inc., operating under the trade name "ISTA", by its attorneys, hereby tenders its Comments in the above-referenced proceeding. In a Public Notice released March 31, 1997, DA 97-637, RM-9060, ("Notice"), the Commission sought comment on a proposal submitted by "over 100 participants in the wireless cable industry" to amend the Commission's rules to enhance the ability of Multipoint Distribution Service ("MDS") and Instructional Fixed Television Service ("ITFS") licensees (collectively, "Petitioners") to engage in fixed two-way digital transmissions ("Petition"). ISTA opposes the modifications to the Commission's rules proposed by Petitioners, and respectfully requests that the Commission deny and dismiss the Petition.

ISTA takes no position on the interference showings submitted by Petitioners and in fact neither agrees nor disagrees with the technical merits of the Petition. Rather, ISTA's

^{1.} ISTA is a trade association representing Interactive Video and Data Service ("IVDS") equipment manufacturers and approximately 40 IVDS licensees, representing approximately 110 million pops., that obtained their licenses through the Commission's auction process.

^{2.} The Notice set forth a comment date of April 30, 1997, pursuant to which these comments are timely filed.

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opposition is founded upon the degree to which the Petition suggests that the Commission can and should play fast and loose with its spectrum management rules and policies. If the Commission grants the relief sought by Petitioners, it would in effect abandon not only the assumptions and suppositions surrounding the MDS and ITFS services, but those underlying IVDS and other spectrum-based services as well. Because amending the Commission's rules in the manner proposed by the Petition would deprive licensees in other services the value of the spectrum for which they paid (and for which many of them are still paying pursuant to installment payment plans), as well as of the assurance that the Commission's spectrum management rules are in any way meaningful, the Commission should deny and dismiss the Petition.

At the onset, it is important to comprehend the contours of the Commission's role -and its constituents' expectations -- under the prevailing auction-based regime of spectrum
management. Prior to the time the Commission obtained authorization to auction licenses to
use portions of the radio spectrum, licensees did not "purchase" the right to use the spectrum
they received, and the Commission conveyed no property right to the spectrum used pursuant
to license. While the present licensing scheme undergirded by an auction program may
likewise not confer any property rights per se upon successful bidders who become licensees,
it certainly engenders an expectation of at least near-term consistency with regard to the
value the Commission ascribes to the spectrum to be offered prior to the commencement of
the auction of same. Radical changes to the permitted uses of the spectrum auctioned -- or to
other portions of the spectrum previously licensed and/or auctioned -- may vastly undermine
that expectation, as well as the confidence necessary for future bidders to make reasoned
judgments about Commission auctions.

The IVDS licensees among ISTA's membership purchased their licenses at the IVDS auction for substantial sums. When the Commission auctioned those licenses, the Commission touted IVDS as a low-cost access ramp to the information superhighway.

Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, RM-6196, R&O, 7 FCC Rcd 1630, ¶ 1 (1992); Mike Mills, Interactive TV: The Leap Looks a Long Way Off, Washington Post, July 2, 1995, at H1. IVDS licensees bid on their licenses and pledged to pay for them with the expectation that IVDS would provide the service that MDS and ITFS now seek to provide by the rule modifications proposed in the Petition. IVDS was conceived as a service that would provide a back channel, i.e, the second portion of a two way channel, that IVDS licensees could offer to cable, television, ITFS and MDS providers to facilitate two-way communications by such licensees. **Id. If the Commission adopts the rule changes proposed by the Petition, IVDS licensees will no longer have a role in the provision of two-way communications for MDS and ITFS operators, and a substantial portion of the value of IVDS licenses will be lost.

If the Commission amends its rules as proposed by Petitioners, it would mark a fundamental change in the nature of MDS and ITFS services that is at odds with both the Commission's authority and its prior practice. To the extent that the Commission has

^{3.} Similarly, PCS licensees paid substantial sums for their licenses acquired at auction. Those licensees did so in large part based on the finite number of two-way service competitors that the Commission's rules authorize. If the Commission grants the rule changes proposed by the Petition, the value of those licenses will be greatly diminished. As a result, to the extent that any of these PCS licensees are eligible for, and have taken advantage of, the Commission's installment payment rules, their ability to secure further capital to make their installment payments, in the face of the diminished value of their licenses, will be significantly impaired. Furthermore, potential future bidders for PCS or other two-way services will have no way of placing valuations on the licenses available, because there will be no way of knowing when and if the Commission will suddenly change its rules to authorize a raft of unanticipated, new competitors.

become a merchant in spectrum (and the <u>only</u> merchant in spectrum), *see* U.C.C. § 2-104 (merchant is one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge peculiar to the practices or goods involved in the transaction), such a policy shift, which would deny IVDS and other Commission licensees a substantial portion of the value of the licenses for which they paid significant sums, flies in the face of well-settled legal principals.

If the Commission were to grant the relief sought by Petitioners, its action would be akin to fraud. The Commission offered IVDS licenses for sale on the premise that such licenses could be used to offer services that others, including MDS and ITFS licensees, could not. The supposition underlying this offer was that IVDS licensees could sell their spectrumbased services to, inter alia, MDS and ITFS licensees for use as a two-way conduit. The rule changes sought in the Petition would essentially permit MDS and ITFS licensees to provide this function for themselves rather than having to turn to IVDS and/or other services. Such a move would deprive IVDS licensees one of the few, and one of the most significant, markets which the Commission, overtly in its statements and implicitly by its rules, promised would be available to IVDS auction participants. Offering to sell something, even something as intangible as the right to use spectrum, by claiming it has value that it in fact does not have constitutes fraud. See Mosely v. Johnson, 82 SE.2d 163, 165 (Ga. App. 1954) (material misrepresentation made by vendor to vendee in order to induce sale constitutes fraud); accord, General Mach. Corp. v. Best Supply Co., 108 SE.2d 158, 160 (Ga. App. 1959); cf., Tatum v. Richter, 373 A.2d 923, 926 (Md. 1977) (when seller is a merchant, his representations require honesty in fact, and may not violate reasonable commercial standards of fair dealing in the relevant trade). The Commission should not deign to travel that path.

Likewise, when analogized to commercial law, the Commission's grant of the instant request would be equally insupportable. As suggested above, the Commission may be analogized to a merchant of spectrum. U.C.C. § 2-104. The Commission sold IVDS licenses with knowledge as to the specific purposes to which the buyers would put the spectrum. U.C.C. § 2-315. To the extent that the Commission, if it grants the instant proposal, would render the IVDS licenses not fit for the specific purposes for which ISTA's members purchased them, the "contract" pursuant to which the Commission sold the IVDS licenses would become voidable. *Id.*

Finally, if the Commission were to modify its rules as proposed by the Petition, its action would also be akin to a taking of property without just compensation. A confiscatory regulatory taking cocurs when the government, by enacting a regulation, deprives a property owner of economically viable use of his property. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Lucas bought two parcels of land zoned for single-family residential use similar to the that of the surrounding lots. *Id.* at 1008. The state subsequently enacted a regulation that prevented Lucas from building any permanent habitable structures on the lots. *Id.* at 1008-09. Lucas filed suit claiming that the regulation, which deprived him of the ability to make economically viable use of the lots he owned, constituted an unconstitutional taking. *Id.* The U.S. Supreme Court held that, if the regulation did in fact deny Lucas the economically viable use of his property, a compensable taking had occurred. *Id.* at 1029-30.

^{4.} A confiscatory regulatory taking, which arises not from a physical intrusion onto one's property but rather a prevention of full use and enjoyment thereof, differs from a physical regulatory taking, which arises from tangible occupation of the subject property. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992); see also Multi-Channel Cable TV Company v. Charlottesville Quality Cable Corp., 65 F.3d 1113 (4th Cir. 1995).

Similarly, if the FCC were to modify its rules as requested by the Petition, it will have denied IVDS licensees all economically viable uses of its license. MDS and ITFS licensees will suddenly be able to do for themselves what the Commission envisioned IVDS licensees doing for them. The ability and, more importantly, the market for IVDS licensees being able to provide such services is what the Commission premised its auction of IVDS licensees upon and what the IVDS licensees relied upon in tendering bids and payment for their licenses. A regulation that completely diminishes this value of the licenses essentially constitutes a taking of that value.

The above quandary into which IVDS and other Commission licensees would be thrown if the Commission grants the Petition is exacerbated by the fact that the Commission would be changing the MDS and ITFS rules so hard on the heels of the PCS and IVDS auctions. If auction participants cannot rely on the Commission to refrain from drastically changing the regulatory landscape upon which such participants must rely in creating business plans and bidding at auction, future auction participation is bound to suffer. If an auction participant pays a certain price for an FCC license, he bases the price he is willing to pay on the market as it presently exists under the Commission's rules. If the Commission significantly modifies those rules so as to change the key presumptions underlying a successful auction participant's bid and to make competitors out of expected customers, the license the bidder has purchased is greatly devalued and he has basically been baited into wasting the scarce capital available for investment in spectrum-based services. That scenario

^{5.} It is not an argument to state that IVDS may still use their licenses to provide services other than two-way use for MDS and ITFS licensees. In *Lucas*, while the property owner retained the right to use the land for recreational and other purposes not requiring the erection of permanent structures, it was enough for takings analysis that he was barred from erecting such structures on his property.

is exactly what would play out for all IVDS licensees if the Commission modifies its rules as requested by Petitioners.

Conclusion

For the foregoing reasons, ISTA respectfully requests that the Commission decline to modify its rules as proposed by Petitioners and DISMISS the Petition.

Respectfully submitted,

INTERACTIVE VIDEO DATA TRADE ASSOCIATION, INC.

By:

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April 30, 1997

CERTIFICATE OF SERVICE

I, Althea Heard, do hereby certify that the foregoing COMMENTS were served this 30th day of April, 1997, by U.S. Mail First Class prepaid, to the following persons at the address listed below:

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